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SEX TRAIT DISCRIMINATION: INTERSEX PEOPLE AND TITLE VII AFTER *BOSTOCK V. CLAYTON COUNTY*

Sam Parry*

Abstract: Title VII of the Civil Rights Act of 1964 protects employees from workplace discrimination and harassment on account of sex. Courts have historically failed to extend Title VII protections to LGBTQ+ people. However, in 2020, the U.S. Supreme Court decision in *Bostock v. Clayton County* changed this. *Bostock* explicitly extended Title VII’s protections against workplace discrimination to “homosexual” and “transgender” people, reasoning that it is impossible to discriminate against an employee for being gay or transgender without taking the employee’s sex into account. While *Bostock* is a win for LGBTQ+ rights, the opinion leaves several questions unanswered. The reasoning in *Bostock* heavily implies the existence of a sex and gender binary, and the Court names only two groups—transgender and homosexual people—for protection. Therefore, it remains unclear whether people who fall outside of the sex or gender binary are protected under Title VII.

This Comment focuses on one non-binary group, intersex people, and asks whether Title VII covers intersex people after *Bostock*. This Comment starts by defining the term intersex and exploring the cultural and legal context of intersex people in the United States. It then turns to Title VII, detailing Title VII’s history and the Court’s reasoning in *Bostock v. Clayton County*. This Comment concludes that Title VII covers intersex people after *Bostock* because the Court’s definition of sex discrimination includes discrimination on the basis of sex traits. Because all intersex people have a natural variation in at least one sex trait (i.e., a trait that humans use to determine sex), Title VII categorically covers intersex people after *Bostock*.

INTRODUCTION

Corey is an intersex person who works for a large employer. Corey was born with Swyer syndrome,¹ which means she has an uncommon combination of sex traits. She has XY sex chromosomes—a “male” genotype—but she has neither testes nor ovaries. While Corey’s internal and external anatomy look typically female, she did not naturally develop breasts or grow pubic hair during puberty.² As a youth she received hormone therapy, and she has female secondary sex characteristics as an

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1. *Rare Disease Database: Swyer Syndrome*, NORD (2019), <https://rarediseases.org/rare-diseases/swyer-syndrome/#:~:text=Swyer%20syndrome%20is%20a%20rare,anatomic%20sex%20development%20is%20abnormal> [https://perma.cc/LB3S-PRCA].

2. *Swyer Syndrome*, INTERSEX SOC’Y OF N. AM., <https://isna.org/faq/conditions/swyer/> [https://perma.cc/9YCA-NUTH].

adult. Corey was identified female at birth, was raised female, and she identifies as a woman. Corey’s employer learns of her Swyer syndrome—learns that she has XY chromosomes—and decides to fire her on these grounds. Outraged, Corey sues her employer. She alleges that her employer discriminated against her because of her sex. Does Corey have a valid claim under Title VII?

This Comment seeks to answer that very question: are intersex people covered under Title VII’s prohibition against sex discrimination? In 2020, the Supreme Court’s landmark ruling in *Bostock v. Clayton County*³ extended Title VII’s protections against workplace discrimination to include homosexual and transgender people.⁴ However, it remains unclear whether LGBTQ+ people who do not fall into these two categories can prevail on a sex discrimination claim under Title VII. In a social and legal system that assumes rigid sex differences, intersex people present a particular problem for courts. Intersex people, such as the fictional Corey, have natural variations in physical traits that humans use to determine sex.⁵ Because current Title VII jurisprudence assumes there are only two sexes, the legal status of intersex people remains in limbo.

Part I of this Comment examines the cultural and historical context of intersex people, including the relationship between intersex identities and various LGBTQ+ identities. Part II surveys intersex jurisprudence, determining whether courts have included intersex people under sex or gender anti-discrimination laws. It then focuses on one anti-discrimination law in particular—Title VII—and details the statute’s scope following *Bostock v. Clayton County*. Part III analyzes whether Title VII covers intersex people given the Court’s ruling in *Bostock*. Ultimately, this Comment concludes that under the *Bostock* Court’s definition of “sex,” Title VII prohibits discrimination on the basis of sex traits.⁶ Because all intersex people have a variation in at least one sex trait, Title VII categorically covers intersex people after *Bostock*.

I. THE CULTURAL AND HISTORICAL CONTEXT OF INTERSEX PEOPLE

Current anti-discrimination laws do not reflect changing understandings of sex and gender in the United States. While the legal rights of gay, bisexual, and transgender people have been hotly debated

3. 590 U.S. ___, 140 S. Ct. 1731, 1737 (2020).

4. *Id.* at 1737.

5. *Intersex*, OXFORD ENGLISH DICTIONARY (3d ed. 2018).

6. Sex traits refer to naturally occurring traits that humans use to determine sex. See *infra* section I.B. for a more detailed explanation.

and litigated in recent decades,⁷ the legal status and rights of other sex or gender minorities have received much less attention. Intersex people are particularly poorly understood by both the public and the legal system. Although intersex people make up an estimated 1.7% of the U.S. population,⁸ legislators and the courts effectively ignore them. This Part explains the meaning of “intersex,” contextualizes intersex people and intersex rights within the larger LGBTQ+ community, and examines legal barriers and discrimination that intersex people face.

A. *Defining “Intersex”*

The word “intersex” is an umbrella term referring to people whose sex traits or reproductive anatomy do not fit within the sex binary.⁹ The Oxford English Dictionary defines intersex as:

[a] person who . . . is physically intermediate between male and female, having characteristics of both sexes (in a species which normally has two distinct sexes), or having sexual organs which are not fully developed as either male or female or which do not correspond to the individual’s chromosomal sex.¹⁰

Other definitions of “intersex” include “existing or occurring between the sexes,”¹¹ and “having or combining the characteristics of both sexes; intermediate between male and female.”¹² Because a person is labeled “intersex” based on entirely physical characteristics, the medical industry has been involved in categorizing intersex traits.¹³ As a result, intersex people are often discussed using medicalized terms, including a recent shift to the term “Disorder of Sex Differentiation/Development” or

7. See, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020) (litigating a ban on transgender students from a high school bathroom); *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020) (litigating a ban on transgender high school athletes playing on sports teams in line with their gender identity); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (litigating the right to same-sex marriage).

8. Melanie Blackless, Anthony Charuvastra, Amanda Derryck, Anne Fausto-Sterling, Karl Lauzanne & Ellen Lee, *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151, 159 tbl.8 (2000). There are not reliable statistics on what percentage of the population has intersex traits. However, this much-quoted survey of medical records by Brown University biologist Anne Fausto-Sterling estimates the percentage to be around 1.7%. Although the study was published in 2000, it remains the most recent statistic available.

9. *What is Intersex?*, INTERSEX SOC’Y OF N. AM., https://isna.org/faq/what_is_intersex/ [<https://perma.cc/CL76-4YVE>].

10. OXFORD ENGLISH DICTIONARY, *supra* note 5.

11. *Id.*

12. *Id.*

13. See *What’s the History Behind the Intersex Rights Movement?*, INTERSEX SOC’Y OF N. AM., <https://isna.org/faq/history/> [<https://perma.cc/W687-9C34>].

“DSD.”¹⁴ However, many in the intersex community contend that variations in reproductive organs and sex traits are natural forms of human diversity and should not be viewed as “conditions” or “disorders.”¹⁵

The physical characteristics that identify someone as intersex vary widely. For example, the Intersex Society of North America¹⁶ lists over twenty intersex variations.¹⁷ Some examples of intersex variations include Androgen Insensitivity Syndrome, in which people with “male” XY chromosomes do not respond to testosterone, leading to genital and secondary sex characteristic development that appears more typically female.¹⁸ Klinefelter syndrome is another variation, in which people have an XXY chromosome pattern and may develop a small penis and testes, develop breasts, or be infertile—while other individuals will appear typically male.¹⁹ Yet another variation, Congenital Adrenal Hyperplasia, occurs when a variation of an enzyme leads to a high exposure to androgenic (“male”) hormones in utero.²⁰ This leads people with XX chromosomes to have a variety of external genitalia, such as an enlarged clitoris or genitals that look more like a male child’s.²¹ Congenital Adrenal Hyperplasia can also lead to development of “male” secondary sex characteristics during puberty, such as body hair, facial hair, a deep voice,

14. See, e.g., Kun Suk Kim & Jongwon Kim, *Disorders of Sex Development*, KOREAN J. OF UROLOGY 1 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3272549/pdf/kju-53-1.pdf> [<https://perma.cc/ZLU6-S9BV>] (using the term “disorders of sex development” to describe intersex traits and discussing the use of the term).

15. Elizabeth Reis, *Divergence or Disorder?: The Politics of Naming Intersex*, 50 PERSP. IN BIOLOGY AND MED. 535, 538 (2007), <https://pubmed.ncbi.nlm.nih.gov/17951887> [<https://perma.cc/2G28-ZEPT>].

16. The Intersex Society of North America was the first intersex advocacy organization in the United States. Although the organization was disbanded in 2008, their website is being preserved by a related non-profit and the resources they compiled remain a valuable source of information on intersex people. *Our Mission*, INTERSEX SOC’Y OF N. AM., <https://isna.org/> [<https://perma.cc/FXH6-46B2>].

17. INTERSEX SOC’Y OF N. AM., CLINICAL GUIDELINES FOR THE MANAGEMENT OF DISORDERS OF SEX DEVELOPMENT IN CHILDHOOD 5–7 (2006), <https://dsguidelines.org/files/clinical.pdf> [<https://perma.cc/9JJP-QA36>].

18. *Androgen Insensitivity Syndrome (AIS)*, INTERSEX SOC’Y OF N. AM., <https://isna.org/faq/conditions/ais> [<https://perma.cc/B2WN-ZJM6>].

19. *Klinefelter Syndrome*, MAYO CLINIC (Sept. 21, 2019), <https://www.mayoclinic.org/diseases-conditions/klinefelter-syndrome/symptoms-causes/syc-20353949#:~:text=Klinefelter%20syndrome%20is%20a%20genetic,isn't%20diagnosed%20until%20adulthood> [<https://perma.cc/A5BZ-X2P3>].

20. *Congenital Adrenal Hyperplasia*, MAYO CLINIC (May 14, 2022), [https://www.mayoclinic.org/diseases-conditions/congenital-adrenal-hyperplasia/symptoms-causes/syc-20355205#:~:text=Congenital%20adrenal%20hyperplasia%20\(CAH\)%20refers,response%20to%20illness%20or%20stress](https://www.mayoclinic.org/diseases-conditions/congenital-adrenal-hyperplasia/symptoms-causes/syc-20355205#:~:text=Congenital%20adrenal%20hyperplasia%20(CAH)%20refers,response%20to%20illness%20or%20stress) [<https://perma.cc/DMB5-A6NH>].

21. *Id.*

and prominent muscles.²² There are not reliable statistics on what percentage of the population has intersex traits.²³ However, many sources²⁴ cite to a survey of medical records by Anne Fausto-Sterling, a Brown University biologist, which estimates the percentage to be around 1.7%.²⁵ One condition alone, Klinefelter syndrome, affects about one in 1,000 newborns.²⁶

While the term “intersex” is relatively new, intersex people have been recognized for centuries.²⁷ Until the 1970s,²⁸ intersex people were referred to in English as “hermaphrodites” after the son of two Greek gods of love—Hermes and Aphrodite.²⁹ However, the intersex community considers that word both derogatory and inaccurate because it suggests that a person has a complete set of both male and female genitalia and gonads,³⁰ an arrangement that does not occur naturally in any intersex person.³¹ Nevertheless, judicial opinions occasionally still use the word “hermaphrodite” to denote intersex people, and when determining an

22. *Id.*

23. *See How Common Is Intersex?*, INTERSEX SOC’Y OF N. AM., <https://isna.org/faq/frequency/> [<https://perma.cc/38AW-8UYQ>] (noting that statistics about intersex people will always be contentious because parties disagree on which variations of sex traits qualify someone as intersex; also noting that the most often cited statistics are approximations).

24. *See, e.g.*, Julie A. Greenberg & Marybeth Herald, *You Can’t Take It with You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819, 821 n.2 (2005) (citing ANNE FAUSTO-STERLING, *SEXING THE BODY* 53 (2000)); Laura Sundin, Comment, *Imposing Identity: Why States Should Restrict Infant Intersex Surgery*, 73 SMU L. REV. 637, 639 n.8 (2020) (citing Blackless et al., *supra* note 8, at 161) (referencing Anne Fausto-Sterling’s study); Meredith Rolfs Severtson, *Let’s Talk About Gender: Nonbinary Title VII Plaintiffs Post-Bostock*, 74 VAND. L. REV. 1507, 1512 n.25 (2021) (first citing Blackless et al., *supra* note 8 at 159; and then citing Leonard Sax, *How Common Is Intersex? A Response to Anne Fausto-Sterling*, 39 J. SEX RSCH. 174, 177 (2002)).

25. Blackless et al., *supra* note 8, at 159 tbl.8.

26. *How Many People Are Affected by or at Risk for Klinefelter Syndrome (KS)?*, NAT’L INST. OF CHILD HEALTH & HUM. DEV. (Dec. 1, 2016), <https://www.nichd.nih.gov/health/topics/klinefelter/conditioninfo/risk> [<https://perma.cc/NV3L-JEWW>].

27. *InQuery: What Does It Mean to Be Intersex?*, THEM (Dec. 4, 2018), <https://www.them.us/story/inquery-intersex#:~:text=According%20to%20the%20Oxford%20English,way%20we%20understand%20it%20today> [<https://perma.cc/YL3H-33W4>].

28. *Id.*

29. *Hermaphroditos*, THEOI PROJECT: GREEK MYTHOLOGY, <https://www.theoi.com/Ouranos/ErosHermaphroditos.html> [<https://perma.cc/8PWT-UTCF>].

30. “Gonads” refers to reproductive sex glands, i.e., testes or ovaries. *Gonad*, BRITANNICA.COM, <https://www.britannica.com/science/gonad> [<https://perma.cc/7UP3-JMDY>].

31. *Is a Person Who Is Intersex a Hermaphrodite?*, INTERSEX SOC’Y OF N. AM., <https://isna.org/faq/hermaphrodite/> [<https://perma.cc/LX5E-UURN>].

intersex person's legal status, the terms are equivalent.³² This Comment uses only the word intersex unless quoting directly from a relevant source.

B. Explaining Gender, Sex, Intersex, and LGBTQ+ Identities

To situate intersex people legally and socially, one must understand the differences between sex, gender, and various LGBTQ+ identities. In American English, the words sex and gender describe related, though not identical, concepts. "Sex" is determined by physical, observable traits relating to sexual organs or secondary sex characteristics that classify a person, most commonly, as a "male" or "female."³³ There is debate over which qualities contribute to a person's sex, with some medical definitions including up to nine distinct attributes: chromosomal sex, gonadal sex, internal morphological sex, external morphological sex, hormonal sex, secondary sex characteristics, assigned sex, gender of rearing, and gender identity.³⁴ In the United States, a person's identification documents establish that person's legal sex.³⁵ Of these documents, the birth certificate is the most important legal indicator of sex.³⁶ Birth certificates reflect the sex a person was assigned at birth, based on the appearance of their external genitalia.³⁷ All subsequent forms of identification reflect the birth certificate.³⁸

Gender, in contrast, is determined by non-physical characteristics often associated with maleness or femaleness (or masculinity and femininity).³⁹

32. See, e.g., *Est. of DiMarco v. Wyo. Dep't of Corr., Div. of Prisons*, 473 F.3d 1334, 1336 n.1 (10th Cir. 2007) (using and defining the word "hermaphrodite"); *In re Est. of Gardiner*, 22 P.3d 1086, 1097 (2001) (using the word "hermaphrodites").

33. Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 271 (1999).

34. Greenberg & Herald, *supra* note 24, at 825–26. The last three of these traits are arguably more related to gender than to sex, reflecting the fact that some definitions of sex incorporate gender within them. As social constructs, the division between sex and gender are blurry and can change based on context.

35. Anne Tamar-Mattis, *What Is a Person's 'Legal Sex?'*, HEALIO NEWS (May 1, 2009), <https://www.healio.com/news/endocrinology/20120325/what-is-a-person-s-legal-sex#:~:text=One%20thing%20is%20clear%3A%20In,the%20appearance%20of%20external%20genitals.&text=For%20most%20people%2C%20the%20designation,genitals%20by%20the%20birth%20attendant> [<https://perma.cc/5HKY-7DJF>]; see, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 602 (4th Cir. 2020) (recognizing that changing one's birth certificate is a component of establishing legal sex); *Zzyym v. Pompeo*, 958 F.3d 1014 (10th Cir. 2020) (finding that requiring a binary sex choice for an intersex person was inaccurate when their birth certificate, their driver's license, and their gender identity were not congruent).

36. Greenberg, *supra* note 33, at 272.

37. *Id.*

38. *Id.*

39. *Id.* at 274.

In addition to the two “binary” options of masculine or feminine, U.S. culture increasingly acknowledges the existence of people with “nonbinary” genders, whose gender does not fit neatly into one of these two categories.⁴⁰ While sex is usually thought of as tangible, static, and consistent across place and time, gender is a less stable social category, and beliefs about what traits are masculine, feminine, or nonbinary vary widely across cultures and time periods.⁴¹ While some individuals feel their gender remains the same throughout their lives, other people are “gender fluid” and may change their gender expression or gender identity over time.⁴² Although sex and gender are conceptually distinct, the Supreme Court blurs the concepts and uses the two words interchangeably.⁴³ Most pertinent for the question analyzed here, courts vary on using the word “sex” or “gender” when analyzing Title VII discrimination claims, sometimes switching between the two terms in one opinion.⁴⁴

The intersex community and LGBTQ+ communities are distinct but overlapping, and it is important to understand the relationship between these different groups. The most familiar identities in the LGBTQ+

40. Mere Abrams, *Understanding What It Means to Be Nonbinary*, HEALTHLINE (Feb. 3, 2022), <https://www.healthline.com/health/nonbinary> [<https://perma.cc/W4ZN-VDFG>]; see also *In re Hollister*, 470 P.3d 436, 443 (2020) (holding that the Oregon statute governing application for legal change of sex permits a legal change of sex to nonbinary). In addition to describing gender, the word “non-binary” can be used as a term to talk generally about people who fall outside of the sex and gender binary for any other reason. See, e.g., InterACT Media, INTERACT, <https://interactadvocates.org/our-advocacy/intersex-media> [<https://perma.cc/H4N9-A3CB>] (using the term “non-binary” to refer to trans and intersex athletes as a group).

41. *Gender*, GENDERED INNOVATIONS, <https://genderedinnovations.stanford.edu/terms/gender.html> [<https://perma.cc/R457-5TQQ>].

42. Sabra L. Katz-Wise, *Gender Fluidity: What It Means and Why Support Matters*, HARV. HEALTH PUBL’G (Dec. 3, 2020), <https://www.health.harvard.edu/blog/gender-fluidity-what-it-means-and-why-support-matters-2020120321544> [<https://perma.cc/7D3X-VX2J>].

43. Reportedly, Ruth Bader Ginsburg intentionally conflated the two concepts to get away from using the word “sex” in her arguments before the Supreme Court when she argued there as a civil rights attorney. Catherine Crocker, *Ginsburg Explains Origin of Sex, Gender*, L.A. TIMES (Nov. 21, 1993, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1993-11-21-mn-59217-story.html> [<https://perma.cc/2KVJ-2ARN>]. Additionally, in 1976 the Equal Employment Opportunity Commission (EEOC) amended its definition of “sex” for the purpose of Title VII to include “a person’s gender, an immutable characteristic with which a person is born.” Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1169 (1991) (quoting EEOC Decision No. 76-75, 19 Fair Empl. Prac. Cas. (BNA) 1823 (1975)).

44. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (“When, therefore, an employer considers both *gender* and legitimate factors at the time of making a decision, that decision was ‘because of’ *sex* and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if *gender* had not been taken into account.”) (emphasis added); see also *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (“Thus, under *Price Waterhouse*, ‘sex’ under Title VII encompasses both sex—that is, the biological differences between men and women—and *gender*.”) (emphasis in original).

rainbow—lesbian, gay, and bisexual—describe sexual orientations. They refer to people who are primarily attracted to individuals of the same sex, in the case of gay and lesbian people, or to people of the same sex and another sex, in the case of bisexual people.⁴⁵ People who are gay or lesbian can collectively be referred to as “homosexual.”⁴⁶ Many other sexual orientations exist beyond gay, lesbian, and bisexual,⁴⁷ but these three are the sexual orientations named in “LGBTQ+” and therefore are the most well-known.

The T of LGBTQ+ refers to transgender, or simply “trans,” people. “Transgender” describes a gender identity and typically refers to people who do not identify with the sex they were assigned at birth.⁴⁸ In contrast, people who *do* identify with the sex they were assigned at birth are called cisgender.⁴⁹ As mentioned above, some people are “nonbinary” or “gender non-conforming” and do not identify with either of the binary male or female sex categories.⁵⁰ Science has not identified any reliable physical predictor of sexual orientation or gender identity, although some studies have identified correlations between neurobiology and queer identities.⁵¹ Ultimately, an individual self-assigns their gender identity and sexual orientation based on their feelings, self-knowledge, and their understanding of human possibilities.⁵²

People with intersex traits do not always fit neatly into the LGBTQ+

45. *Sexual Orientation, PLANNED PARENTHOOD*, <https://www.plannedparenthood.org/learn/sexual-orientation/sexual-orientation#:~:text=and%20gender%20identity,-.Sexual%20orientation%20is%20about%20who%20you're%20attracted%20to%20and,%2C%20female%2C%20genderqueer%2C%20etc> [https://perma.cc/ZZ8T-FCE2].

46. *What is Homosexuality?*, WEBMD (June 29, 2021), <https://www.webmd.com/sex/what-is-homosexuality> [https://perma.cc/8BEP-YLQT].

47. Examples of additional sexual orientations include asexual, pansexual, and demisexual. See Stephanie Barnes, *From Graysexual to Heteroflexible: Here's a Big List of Sexualities in 2022*, MINDBODYGREEN (Jan. 13, 2022), <https://www.mindbodygreen.com/articles/list-of-sexualities> [https://perma.cc/HFE3-GK87].

48. *A Glossary: Defining Transgender Terms*, AM. PSYCH. ASS'N (Sept. 2018), <https://www.apa.org/monitor/2018/09/ce-corner-glossary> [https://perma.cc/KSP6-NYWF].

49. *Id.*

50. Abrams, *supra* note 40.

51. Greenberg & Herald, *supra* note 24, at 832; see also Charles E. Roselli, *Neurobiology of Gender Identity and Sexual Orientation*, J. NEUROENDOCRINOLOGY 1 (2018) (discussing studies that indicate “there is a significant biological contribution to the development of an individual’s sexual identity and sexual orientation”).

52. For more information, see this extensive 2013 study cataloguing the experiences of people understanding themselves to be LGBTQ+ and their timelines for coming out to friends and family: *A Survey of LGBT Americans: Attitudes, Experiences and Values in Changing Times*, PEW RSCH. CTR. (2013), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2013/06/SDT_LGBT-Americans_06-2013.pdf [https://perma.cc/T9BF-NFTN].

community. Intersex people are not well-understood in U.S. culture and many people in the United States assume intersex people are part of the LGBTQ+ community described above.⁵³ However, while some intersex people consider themselves to be LGBTQ+ because of their intersex traits, others do not.⁵⁴ While most queer identities are self-assigned, third parties, such as medical personnel, usually identify an individual as intersex.⁵⁵ Most intersex people are additionally assigned “male” or “female” at birth and are raised as one of these binary genders.⁵⁶ Intersex traits do not predict a person’s sexual orientation nor do they predict gender identity.⁵⁷ Some intersex people feel comfortable in the gender assigned to them at birth, while others may prefer association with a different gender.⁵⁸

Cultures incorporate intersex people, and other sex and gender minorities, into society in different ways. Cultures in the Dominican Republic, Papua New Guinea, Polynesia/Pacific Islands, Native America, Ancient Israel, and India all recognize a third sex, which includes intersex people, trans people, or both.⁵⁹ While some cultures develop distinct “third sex” gender roles, others incorporate people with sex and gender differences into either male or female social roles.⁶⁰ For example, in Samoa, Fa’afafine and Fa’afatama are third and fourth genders with distinct social roles.⁶¹ The special roles of Fa’afafine and Fa’afatama people include caring for elderly relatives and speaking frankly about taboo topics such as sexual health.⁶² In contrast, the culture of seventeenth century England recognized a third sex, but incorporated these individuals into either male or female social roles.⁶³ The renowned jurist Lorde Coke explained that every person is “either a male, or female, or an hermaphrodite [sic]” and that, under English law, intersex people would take either a male or female legal status depending on which

53. Jonathan Leggette, *Not Invisible: Debunking 10 Intersex Myths*, GLAAD (Apr. 3, 2018), <https://www.glaad.org/amp/debunking-10-intersex-myths> [<https://perma.cc/BR8G-8GP9>].

54. *Id.*

55. Greenberg, *supra* note 33, at 271.

56. *Here’s What to Know About Having a Baby Who Is Intersex*, HEALTHLINE (Oct. 29, 2019), <https://www.healthline.com/health/baby/what-does-intersex-look-like> [<https://perma.cc/9UTH-DC3A>].

57. Leggette, *supra* note 53.

58. *Id.*

59. Greenberg, *supra* note 33, at 275–77.

60. *Id.*

61. *Beyond Gender: Indigenous Perspectives, Fa’afafine and Fa’afatama*, NAT. HIST. MUSEUM, <https://nhm.org/stories/beyond-gender-indigenous-perspectives-faafafine-and-faafatama> [<https://perma.cc/3D48-Z3HV>].

62. *Id.*

63. Greenberg, *supra* note 33, at 278.

“sexe . . . doth prevaile [sic].”⁶⁴ As discussed in this section, sex, gender, sexual orientation, and gender identity are distinct concepts that vary across time and place, and intersex people do not always fit neatly within these categories. Intersex people also face challenges that are distinct from those faced by LGBTQ+ groups.

C. *Challenges Intersex People Face*

Although intersex traits occur naturally and have existed as long as humans have, there is less awareness and advocacy around intersex people than many other sexual or gender minorities.⁶⁵ While gay and trans activism in the United States was in full swing by the 1970s,⁶⁶ intersex organizing and activism did not begin until the 1990s, with the founding of the now-defunct Intersex Society of North America.⁶⁷ These divergent timelines likely result from multiple factors. Intersex traits vary and many can remain undetected without genomic or other medical testing.⁶⁸ This means that people with intersex traits can go their whole lives without knowing they have a non-standard chromosome combination or internal organs atypical of their assigned sex.⁶⁹

Another important challenge is the prevalence of infant sex assignment surgery. Infant sex assignment surgeries are cosmetic surgeries performed on infants born with ambiguous genitalia.⁷⁰ The practice became standard in the United States in the 1960s, and aimed to help intersex children fit into typical male or female sex and gender roles.⁷¹ However, the

64. *Id.* at 277–78.

65. NAT’L ACADS. OF SCIS., ENG’G, & MED., UNDERSTANDING THE WELL-BEING OF LGBTQI+ POPULATIONS 44 (Charlotte J. Patterson et al. eds., 2020).

66. The uprising at Compton’s Cafeteria in 1966 and the Stonewall Inn in 1969 are popularly understood to mark the beginning of the gay and trans rights movement, although there are lesser-known instances of coordinated queer uprising through the 1960s. Greggor Mattson, *The Stonewall Riots Didn’t Start the Gay Rights Movement*, JSTOR DAILY (June 12, 2019), <https://daily.jstor.org/the-stonewall-riots-didnt-start-the-gay-rights-movement> [<https://perma.cc/FBG3-4R3B>].

67. INTERSEX SOC’Y OF N. AM., *supra* note 13.

68. For example, Klinefelter Syndrome and Androgen Insensitivity Syndrome (AIS), discussed *supra* section I.A.

69. INTERSEX SOC’Y OF N. AM, *supra* note 9 (“Though we speak of intersex as an inborn condition, intersex anatomy doesn’t always show up at birth. Sometimes a person isn’t found to have intersex anatomy until she or he reaches the age of puberty, or finds himself an infertile adult, or dies of old age and is autopsied. Some people live and die with intersex anatomy without anyone (including themselves) ever knowing.”).

70. “*I Want to Be Like Nature Made Me*”, HUM. RTS. WATCH (July 25, 2017), <https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us#> [<https://perma.cc/QYF2-DVPG>].

71. *Id.*

procedure often causes scarring, sterilization, or loss of sexual enjoyment, and can leave the child with genitals that do not match their gender identity.⁷² Because of these risks and the surgery's purely cosmetic nature, international human rights groups have declared intersex genital surgeries for infants a human rights abuse.⁷³ Intersex organizations consider ending the practice of infant sex assignment surgery to be an urgent political fight.⁷⁴ The practice's prevalence and the shame and secrecy surrounding sex non-conformity⁷⁵ hamper awareness raising and community building among intersex folks, particularly when an individual's intersex traits are concealed from them until late in life.⁷⁶

While there is limited research on intersex people as a group, the existing data shows that intersex people suffer from high rates of discrimination⁷⁷ and much worse health outcomes than the general population.⁷⁸ According to one study, more than four in five intersex LGBTQ+ respondents reported that discrimination affects their financial wellbeing.⁷⁹ A similar proportion reported that discrimination negatively affects their ability to find or retain employment.⁸⁰ About half of intersex LGBTQ+ people reported avoiding certain activities or situations—such as doctors' offices, encounters with police officers, or restaurants—due to the discrimination they expect to face there.⁸¹ Additionally, 42% of intersex LGBTQ+ people received unemployment assistance in the year preceding the study, more than twice the rate of non-intersex LGBTQ+ people.⁸² Despite these significant social and economic barriers, the legal

72. INTERACT, INTERSEX MEDIA GUIDE 4, <https://live-interact-advocates.pantheonsite.io/wp-content/uploads/2017/01/INTERSEX-MEDIAGUIDE-interACT.pdf> [https://perma.cc/8M5F-BXBF].

73. *Id.*

74. *Key Issues Facing People with Intersex Traits*, CTR. FOR AM. PROGRESS (Oct. 26, 2021), <https://www.americanprogress.org/article/key-issues-facing-people-intersex-traits> [https://perma.cc/324A-C7GN].

75. In some cases, doctors perform genital assignment surgeries without informing the parents of intersex children, or parents keep the surgery secret from their intersex child. HUM. RTS. WATCH, *supra* note 70.

76. *Id.*

77. CTR. FOR AM. PROGRESS, *supra* note 74.

78. Amy Rosenwohl-Mack, Suegee Tamar-Mattis, Arlene B. Baratz, Katharine B. Dalke, Alesdair Itelson, Kimberly Zieselman & Jason D. Flatt, *A National Study of the Physical and Mental Health of Intersex Adults in the U.S.*, PLOS ONE 1, 11–12 (Oct. 9, 2020), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0240088> [https://perma.cc/2WST-P5EQ].

79. CTR. FOR AM. PROGRESS, *supra* note 74.

80. *Id.*

81. *Id.*

82. *Id.*

rights of intersex people remain murky; it is unclear whether many anti-discrimination laws protect intersex people.

II. THE UNCERTAIN LEGAL STATUS OF INTERSEX PEOPLE IN THE CONTEXT OF SEX AND GENDER DISCRIMINATION LAW

While a few states define intersex people as a protected class,⁸³ no such laws exist at the federal level. Likewise, courts disagree as to whether anti-discrimination laws recognizing “sex” or “gender” as protected classes also protect intersex people.⁸⁴ Section A of this Part reviews current intersex jurisprudence, surveying court decisions that decided whether “intersex” describes a sex, gender, or neither, in various legal contexts. Section B examines the history and evolution of one federal anti-discrimination law in particular, Title VII of the Civil Rights Act of 1964 (“Title VII”). Section C outlines recent developments in Title VII jurisprudence brought about by the Supreme Court’s landmark decision *Bostock v. Clayton County*.

A. Current Intersex Jurisprudence

While intersex jurisprudence remains underdeveloped in comparison to jurisprudence on many LGBTQ+ identities,⁸⁵ a handful of federal court cases speak to the legal status of intersex people. In lieu of a Supreme Court decision clarifying the status of intersex people with respect to sex or gender discrimination, these lower courts offer guidance.

Several courts hold or imply that “intersex” describes a sex or a gender. In *Zzyym v. Pompeo*,⁸⁶ the Tenth Circuit assumed that “intersex” describes a sex. The plaintiff, Zzyym, was denied a passport after submitting an application in which they identified “intersex” as their sex.⁸⁷ Although the case did not explicitly address whether “intersex” describes a sex, the court implicitly accepted this premise in finding that “intersex” more accurately described Zzyym’s sex than “male” or “female.”⁸⁸

83. See, e.g., N.J. STAT. § 26:2H-12.101 (2021), CAL. HEALTH & SAFETY CODE § 150900 (2021) (including intersex people as a protected class under state anti-discrimination laws).

84. See *infra* section III.A.

85. Chris Geidner, *The Court Cases that Changed L.G.B.T.Q. Rights*, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/19/us/legal-history-lgbtq-rights-timeline.html> (last visited Nov. 1, 2022) (listing landmark LGBTQ+ cases, none of which explicitly secure rights for intersex people).

86. 958 F.3d 1014 (10th Cir. 2020).

87. *Id.* at 1018.

88. *Id.* at 1025.

In an earlier case, *Hughes v. Home Depot, Inc.*,⁸⁹ a district court in New Jersey held that harassment of an intersex employee qualified as harassment on the basis of gender under the New Jersey Law Against Discrimination.⁹⁰ The court reasoned that the intersex plaintiff suffered harassment because of her gender: she was referred to as “it,” encountered the derogatory term “faggot” written on her locker, and found the phrase “we don’t need your kind here, go home” written on her car.⁹¹ While the holding makes clear that the harassment was on the basis of gender, the court does not explain why it considered this intersex plaintiff to be covered by a law prohibiting gender discrimination.

In another workplace discrimination case, *Johnson v. Fresh Mark, Inc.*,⁹² a district court in Ohio suggested in dicta that if the transgender plaintiff was fired for being intersex rather than transgender, her Title VII claim may have been on stronger footing.⁹³ Because Title VII prohibits discrimination in the workplace on the basis of sex,⁹⁴ this court entertained the idea that “intersex” might describe a sex for the purposes of a Title VII claim.⁹⁵

However, other courts have declined to recognize intersex as a sex or a gender or have otherwise limited protections for intersex people as a protected class. In *DiMarco v. Wyoming*,⁹⁶ the district court in Wyoming held that the plaintiff, who was “born with ambiguous gender” (i.e., was an intersex person), did not experience discrimination based on sex for the purpose of their Fourteenth Amendment equal protection claim.⁹⁷ Rather, the court only analyzed whether there was evidence that intersex people, as a group, were “subjected to a history of purposeful unequal treatment.”⁹⁸ By not considering intersex people to be included under the protected class of sex, the court implied that intersex discrimination is distinct from sex discrimination.

Finally, in *Woods v. C.G. Studios, Inc.*,⁹⁹ a district court in Pennsylvania held that the definition of “sex” in a Pennsylvania

89. 804 F. Supp. 2d 223 (D.N.J. 2011).

90. *Id.* at 227.

91. *Id.* at 225.

92. 337 F. Supp. 2d 996 (N.D. Ohio 2003).

93. *Id.* at 1000.

94. 42 U.S.C. § 2000e-2(a)(1) (1964).

95. *Fresh Mark*, 337 F. Supp. 2d at 1000.

96. 300 F. Supp. 2d 1183 (D. Wyo. 2004).

97. *Id.* at 1197.

98. *Id.*

99. 660 F. Supp. 176 (E.D. Pa. 1987).

employment discrimination law does not cover intersex people.¹⁰⁰ Instead of determining the status of intersex people in relation to sex or gender, the court decided that the harassment occurred because the plaintiff underwent “gender corrective surgery” for an intersex condition, and that undergoing gender corrective surgery is not a protected status under that law.¹⁰¹ Overall, courts vary on whether gender or sex discrimination laws cover intersex people.

B. Title VII Jurisprudence Before Bostock v. Clayton County

Title VII is a federal anti-discrimination statute that prohibits discrimination in the workplace based on any of five protected characteristics: race, color, religion, sex, or national origin.¹⁰² Title VII applies to all U.S. employers with fifteen or more employees, and to employers who are federal, state, or local governments.¹⁰³ The relevant portion of the law prohibits discrimination “against any individual . . . because of such individual’s . . . sex.”¹⁰⁴ Title VII itself does not define “sex,” nor does the statute’s legislative history shed light on what definition of “sex” the legislature intended.¹⁰⁵ Famously, a U.S. Representative named Howard Smith who opposed the Civil Rights Act of 1964 added the word “sex” to the text of the bill shortly before it went before the House floor for a vote.¹⁰⁶ He seemingly believed that the addition would doom the entire bill.¹⁰⁷ Instead, the bill passed and became law.¹⁰⁸

Since the Act’s passage, Title VII’s reach has been expanded by both Congress and the courts. For example, in 1978 Congress defined “sex” to include “pregnancy, childbirth, or related medical conditions.”¹⁰⁹ A few years later, in 1986, the Supreme Court held that Title VII extends

100. *Id.* at 178.

101. *Id.*

102. 42 U.S.C. § 2000e-2(a)(1) (1964).

103. *Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, n.1 (Oct. 12, 2012), <https://www.eeoc.gov/laws/guidance/questions-and-answers-application-title-vii-and-ada-applicants-or-employees-who#:~:text=%5B1%5D%20Title%20VII%20and%20the,%2C%20state%2C%20and%20local%20governments> [<https://perma.cc/E4Y2-NXJ3>].

104. 42 U.S.C. § 2000e-2(a)(1).

105. Mark Berghausen, *Intersex Employment Discrimination: Title VII and Anatomical Sex Nonconformity*, 105 NW. U. L. REV 1281, 1311 (2011).

106. *Bostock v. Clayton Cnty.*, 590 U.S. ___, 140 S. Ct. 1731, 1752 (2020); *id.* at 1311.

107. *Bostock*, 140 S. Ct. at 1752; Berghausen, *supra* note 105, at 1311.

108. *Bostock*, 140 S. Ct. at 1752; Berghausen, *supra* note 105, at 1311.

109. Pregnancy Discrimination Act, Pub. L. No. 95-555 (1978).

protections based on sex to victims of workplace sexual harassment.¹¹⁰ Twelve years later, the Court clarified that Title VII also protects against same-sex workplace sexual harassment.¹¹¹ Two other Title VII doctrines are especially relevant to the legal status of intersex people: (1) the “perceived” member of a group theory and (2) the “sex stereotyping” theory.

1. “Perceived” Member of a Group Theory for Title VII

Some courts hold that plaintiffs have a cognizable Title VII claim if they suffer harassment because they are *perceived* to be a member of a protected class, even if they do not actually belong to that class. For example, in *EEOC v. Boh Bros. Construction Co.*,¹¹² an employee suffered sexual harassment at work from a co-worker who perceived him to be insufficiently “manly.”¹¹³ The court’s inquiry into whether the harassment was because of sex did not hinge on the plaintiff’s gender presentation (i.e., the court did not determine whether the employee was *actually* unmanly).¹¹⁴ Rather, the court focused on the “alleged harasser’s subjective perception of the victim.”¹¹⁵ The court stated that discrimination based on “wrong or ill-informed assumptions” about an employee can trigger Title VII protections.¹¹⁶ The Fifth Circuit has held that Title VII protection based on ill-informed assumptions about an individual also applies to sex discrimination against women¹¹⁷ and discrimination on the basis of national origin.¹¹⁸

The Equal Employment Opportunity Commission (EEOC), which enforces Title VII claims for the federal government,¹¹⁹ also codifies this theory in its internal guidelines.¹²⁰ In the context of race discrimination under Title VII, the EEOC guidelines state that “[d]iscrimination against

110. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986).

111. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

112. 731 F.3d 444 (5th Cir. 2013).

113. *Id.* at 457.

114. *Id.*

115. *Id.* at 456.

116. *Id.*

117. *Black v. Pan Am. Lab’ys, L.L.C.*, 646 F.3d 254, 260 (5th Cir. 2011).

118. *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 401–02 (5th Cir. 2007).

119. *What Laws Does EEOC Enforce?*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/youth/what-laws-does-eeoc-enforce> [https://perma.cc/5EJG-AHLV].

120. U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2006-1, SECTION 15: RACE AND COLOR DISCRIMINATION, § 15-II What is “Race” Discrimination? (2006), <https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination> [https://perma.cc/3BHA-FA4H].

an individual based on a perception of his or her race violates Title VII even if that perception is wrong.”¹²¹ Therefore, for Title VII claims, an employer’s perception of their employee’s race, color, religion, sex, or national origin matters more than the plaintiff’s actual identity.

2. “Sex Stereotyping” Theory for Title VII Claims

Another relevant Title VII doctrine is the “sex stereotyping theory.” In 1989 the Supreme Court held that “sex stereotyping” can form the basis of a sex discrimination claim.¹²² Sex stereotyping occurs when a person is discriminated against for failing to conform to social expectations around gender roles, behavior, or appearance.¹²³ Some LGBTQ+ individuals have prevailed on Title VII claims using this sex stereotyping theory.¹²⁴ For example, in *Barnes v. City of Cincinnati*,¹²⁵ the Sixth Circuit held that a police department’s stated reason for firing a transgender woman—her lack of a “command presence”—improperly relied on subjective sex stereotypes about masculinity and therefore violated Title VII.¹²⁶

Although individual LGBTQ+ plaintiffs have brought successful Title VII claims under these theories, their inclusion under Title VII was not guaranteed. Until 2017, no court categorically extended Title VII’s prohibition on discrimination “because of . . . sex” to people discriminated against on the basis of sexual orientation (e.g., being gay, lesbian, or bisexual) or gender identity (e.g., being transgender or nonbinary).¹²⁷ In 2019, the Supreme Court granted certiorari in the case

121. *Id.*

122. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

123. *See, e.g., id.* (finding that employers violated Title VII and discriminated on the basis of sex “by assuming or insisting that [female employees] matched the stereotype associated with their group”); *see also* *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (holding that a transgender defendant sufficiently pleaded a claim of sex stereotyping and gender discrimination when he was fired for failing to conform to expectation about “how a man should look and behave”).

124. *See, e.g., Barnes v. City of Cincinnati*, 401 F.3d 729, 734 (6th Cir. 2005) (using the sex stereotyping theory to prevail on a sex discrimination claim under Title VII).

125. 401 F.3d 729 (6th Cir. 2005).

126. *Id.* at 734, 736–38. *See also City of Salem*, 378 F.3d at 575 (holding that “Title VII coverage for non sex-stereotypical behavior” does not become invalid “simply because the person is a transsexual”).

127. *See, e.g., Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 341 (7th Cir. 2017) (holding that “discrimination on the basis of sexual orientation is a form of sex discrimination”); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018) (holding that “Title VII prohibits discrimination on the basis of sexual orientation as discrimination ‘because of . . . sex’”); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 600 (6th Cir. 2018) (holding that “[d]iscrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII”).

Bostock v. Clayton County to address a circuit split on this question.¹²⁸

C. *Title VII and Bostock v. Clayton County*

The 2020 landmark Supreme Court case *Bostock v. Clayton County* expanded legal protections for gay, lesbian, and transgender people.¹²⁹ Specifically, the Court held that individuals who are discriminated against for being homosexual or transgender can seek protection and a remedy under Title VII using its prohibition on sex discrimination.¹³⁰ To the surprise of Supreme Court commentators and the LGBTQ+ community,¹³¹ Justice Gorsuch—a Trump appointee and judicial conservative¹³²—authored the majority opinion. Justice Gorsuch is understood to be a “textualist,” meaning he believes the Court should narrowly look to the “text, structure, and history” of a statute to decide its proper meaning.¹³³ Accordingly, the opinion he authored in *Bostock* relies heavily on the meaning of the word “sex” at the time Congress passed the Civil Rights Act of 1964, the specific legal meaning of the phrase “because of,” and the logical inferences one must draw when putting these pieces of the statute together.¹³⁴

1. *The Bostock Court’s Narrow Definition of “Sex”*

To conduct its analysis, the *Bostock* Court adopted, *arguendo*, a narrow definition of sex: “status as either male or female [as] determined by reproductive biology.”¹³⁵ The Court acknowledged that this definition was exceedingly narrow, and that even in 1964, the definition of sex captured “more than anatomy and reach[ed] at least some norms concerning gender

128. *Bostock v. Clayton Cnty.*, __ U.S. __, 140 S. Ct. 1731, 1738 (2020) (“And we granted certiorari in these matters to resolve at last the disagreement among the courts of appeals over the scope of Title VII’s protections for homosexual and transgender persons.”).

129. *Id.* at 1737.

130. *Id.*

131. Robert Barnes, *Neil Gorsuch? The Surprise Behind the Supreme Court’s Surprising LGBTQ Decision*, WASH. POST (June 16, 2020, 8:06 PM), https://www.washingtonpost.com/politics/courts_law/neil-gorsuch-gay-transgender-rights-supreme-court/2020/06/16/112f903c-afe3-11ea-8f56-63f38c990077_story.html [<https://perma.cc/K226-NWEL>].

132. Ellis Kim, *What We Know—and Don’t—About Neil Gorsuch’s Judicial Philosophy*, PBS NEWS HOUR (Mar. 20, 2017, 10:31 AM), <https://www.pbs.org/newshour/nation/know-dont-neil-gorsuchs-judicial-philosophy> [<https://perma.cc/E9WW-VXAW>].

133. *Id.*

134. *Bostock*, 140 S. Ct. at 1743 (“At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings.”).

135. *Id.* at 1739.

identity and sexual orientation.”¹³⁶ However, the Court chose to proceed on the premise that “sex” refers “only to biological distinctions between male and female.”¹³⁷ By naming only these two sex categories, the Court left unsettled the legal status of people with physical traits that defy categorization as “either male or female.”¹³⁸ In addition, the Court invoked the sex binary throughout its opinion,¹³⁹ leaving open the question of whether Title VII currently covers intersex people. The text of Title VII does not include the words “sexual orientation,” “gender identity,” “transgender,” or “homosexual,” so the Court did not attempt to define these terms, nor did the Court hinge its analysis on those definitions.¹⁴⁰

Equipped with its definition of sex, the *Bostock* Court held that discriminating against a person for being homosexual or transgender *must* involve discriminating against that person on the basis of sex.¹⁴¹ This is because firing an employee for being attracted to members of the same sex (in the case of homosexuals) *requires* the employer to take into account the employee’s sex.¹⁴² Likewise, firing someone for being transgender *requires* an employer to take into account whatever sex the employee was assigned at birth.¹⁴³ Because the employee’s sex is one of the elements relevant to the employer’s decision to terminate in either of these scenarios, the discrimination is based on sex. The Court then explained that Title VII carries a “but for” causation standard,¹⁴⁴ meaning the law is violated any time an employee’s sex is a contributing factor in the decision to fire them, even if it is not the only, or even the primary, factor.¹⁴⁵ Although the employer in these cases may also consider factors other than sex—an employee’s gender identity or their sexual orientation—this does not obviate the fact that the employer relied on sex as a factor in their decision to fire an employee.¹⁴⁶ *Bostock*, therefore,

136. *Id.*

137. *Id.*

138. *Id.* at 1738.

139. *See infra* section II.C.2 for examples.

140. *See generally* Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq.; *Bostock*, 140 S. Ct. 1731. The Civil Rights Act of 1964 does not mention these terms and *Bostock* does not define them.

141. *Bostock*, 140 S. Ct. at 1741.

142. *Id.*

143. *Id.* (“[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”).

144. *Id.* at 1739.

145. *Id.* at 1744 (“[T]he plaintiff’s sex need not be the sole or primary cause of the employer’s adverse action.”).

146. *Id.* at 1739. This type of causation—where sex must only be one contributing factor in the decision to discriminate, not the only factor—is known as “but for” causation. *Id.*

effectively designated homosexual and transgender people as protected classes under Title VII's prohibition on sex discrimination.

The Court's opinion in *Bostock* did not supply a singular test to guide future courts encountering different fact patterns. Rather, the Court asks readers to "imagine" different scenarios to illustrate that an individual's sex is always one but-for cause of discrimination when a person is fired for being transgender or homosexual.¹⁴⁷ Future courts attempting to apply Title VII to slightly different factual circumstances are likely to rely on these "simple test[s]" that the Court presented throughout the text of its opinion.¹⁴⁸ Many of these tests assume or invoke a sex and gender binary, complicating the Title VII analysis for non-binary plaintiffs.

2. *The Bostock Court's Use of the Gender Binary*

Several of the *Bostock* Court's tests explicitly invoke the gender binary or require courts to imagine the plaintiff as the other sex to determine whether sex was a relevant factor in the discrimination. For example, the *Bostock* Court imagined a scenario where an employer has a policy of firing known homosexual employees:

The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman.¹⁴⁹

Likewise, the Court invoked a binary idea of sex when stating the test for a triable Title VII claim. A triable claim exists when a plaintiff alleges "that the harassment would not have taken place but for his sex—that is, the plaintiff would not have suffered similar treatment if he were female."¹⁵⁰ In a different section, the Court used the phrase "men and women" to describe the "employees" who may be affected by employment discrimination, making no mention of additional possible sex categories.¹⁵¹

In other parts of the opinion, the Court did not explicitly invoke the sex

147. *See id.* at 1742, 1746.

148. *Id.* at 1743.

149. *Id.* at 1742.

150. *Id.* at 1744.

151. *Id.* at 1743 ("For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex.").

binary, instead employing illustrations that merely suggested changing the imagined plaintiff's sex. Furthermore, the Court used the word "sex," without supplying binary choices. For example, the Court stated that an employer triggers Title VII if they "intentionally treat individual employees differently because of their sex"¹⁵² or if they "necessarily and intentionally appl[y] sex-based rules."¹⁵³ Similarly, the Court stated that an employer's policy violated Title VII when it "could not 'pass the simple test' asking whether an individual female employee would have been treated the same regardless of her sex."¹⁵⁴ Further, the Court acknowledged Title VII's expansion over the years to reach scenarios other than those originally contemplated by the legislators who passed the law, affirming that "[a]s enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them."¹⁵⁵

The Court also addressed a counter-argument that sexual orientation and gender identity characteristics exist separately and distinctly from sex.¹⁵⁶ The Court rebutted this argument with a hypothetical in which an anonymous job applicant fills out an application form that asks for their sexual orientation and gender identity.¹⁵⁷ The Court reasoned that it is impossible to define the words homosexual or transgender "without using the words man, woman, or sex (or some synonym)"; therefore, there is "no way an employer can discriminate against those who check the homosexual or transgender box without discriminating in part because of an applicant's sex."¹⁵⁸ This sets up yet another test for whether sex is a but for cause of an employment decision: can the identity discriminated against be described without using the word sex, man, woman, or some synonym?

Finally, to illustrate why discrimination against transgender people is also "because of sex," the Court posed another hypothetical:

[A]n employer [] fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in

152. *Id.* at 1742.

153. *Id.* at 1745.

154. *Id.* at 1743.

155. *Id.* at 1747.

156. *Id.* at 1746.

157. *Id.*

158. *Id.*

an employee identified as female at birth.¹⁵⁹

Because the employee's sex at birth is one factor material to the decision to fire them, the discrimination is "because of sex" under the Court's textual reading.¹⁶⁰

The majority opinion in *Bostock* is accompanied by two vigorous dissenting opinions. The dissenters, also purported textualists,¹⁶¹ proposed a different test: "[h]ow would the terms of a statute have been understood by ordinary people at the time of enactment?"¹⁶² The dissenters included an appendix that provides dictionary definitions contemporary to the passage of Title VII.¹⁶³ It also catalogues uses and definitions of the word "sex" from 1382 to 2011.¹⁶⁴ While most definitions restrict sex to "one of two divisions of . . . human beings,"¹⁶⁵ or similar language, the 1964 Concise Oxford Dictionary of Current English defines sex as "being male or female or hermaphrodite."¹⁶⁶ Further, the word "intersex" appears under the definition of "sex" in both the 1966 and 2002 editions of Webster's Third New International Dictionary.¹⁶⁷ In both cases, the word follows a more scientific definition of sex, describing "the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction . . ." and includes "intersex" as a related term.¹⁶⁸

Although the Court's decision in *Bostock* was celebrated for unequivocally expanding Title VII protections to more LGBTQ+ people, the Court's holding is explicitly narrow. The Court stated that its decision in *Bostock* only bears on whether "an employer can fire someone for being homosexual or transgender" under Title VII.¹⁶⁹ The Court's holding, therefore, does not make clear *Bostock's* effect on the rights of unnamed sex or gender minorities such as nonbinary people, asexual people, bisexual people, or intersex people. The next Part examines whether

159. *Id.* at 1741.

160. *Id.* at 1741–42 (stating that, in this scenario, "the individual employee's sex plays an unmistakable and impermissible role in the discharge decision").

161. See Marc Spindelman, *Bostock's Paradox: Textualism, Legal Justice, and the Constitution*, 69 BUFF. L. REV. 553 (2021) (discussing the extent to which *Bostock* should be considered a textualist decision).

162. *Bostock*, 140 S. Ct. at 1766.

163. *Id.* at 1784–822.

164. *Id.* at 1784–91.

165. *Id.* at 1785.

166. *Id.* at 1789.

167. *Id.* at 1785, 1790.

168. *Id.* at 1785 (quoting *Sex*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1966)); *id.* at 1790 (quoting *Sex*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (2002)).

169. *Id.* at 1737.

Title VII covers intersex people given the history of intersex jurisprudence and the Court's opinion in *Bostock*.

III. INTERSEX PEOPLE ARE PROTECTED UNDER TITLE VII AFTER *BOSTOCK V. CLAYTON COUNTY*

Although the legal status of intersex people under Title VII is currently undecided, this Part demonstrates why courts considering the issue should find that intersex people have a cognizable Title VII claim. Section A demonstrates that Title VII categorically covers intersex people because intersex discrimination involves discrimination on the basis of sex traits. Because all intersex people have a natural variation in a sex trait, discrimination against intersex people is always discrimination because of sex. Section B then turns to other possibilities for including intersex people under Title VII. It concludes that, although these avenues provide some coverage, the sex trait theory detailed in section A is the most straightforward path to Title VII relief for intersex plaintiffs.

A. *Discrimination Against Intersex People Is Discrimination on the Basis of Sex Traits*

Courts considering whether Title VII protects intersex people must find that discrimination against intersex people is discrimination on the basis of sex traits. Therefore, Title VII's plain language covers intersex people. Both the *Bostock* court's definition of "sex" and definitions in other contexts support this interpretation.¹⁷⁰ Despite its use of sex- and gender-binary language, *Bostock* does not preclude courts from finding that Title VII prohibits discrimination against intersex people. Finally, all recent court cases involving intersex people assume that sex or gender categories include intersex people, while older cases are less conclusive. Overall, intersex people should be categorically included under Title VII after *Bostock* because the *Bostock* Court's definition of sex includes intersex people.

1. *Many Definitions of "Sex" Include Intersex Traits*

Intersex people are included under the *Bostock* Court's definition of sex. Additionally, executive branch definitions of "sex,"¹⁷¹ definitions

170. See *infra* section III.A.1.

171. U.S. Dep't of Just., Opinion Letter on the Interpretation of *Bostock v. Clayton County* Regarding the Nondiscrimination Provisions of the Safe Streets Act, the Juvenile Justice and Delinquency Prevention Act, the Victims of Crime Act, and the Violence Against Women Act (Mar. 10, 2022), <https://www.justice.gov/crt/page/file/1481776/download> [<https://perma.cc/D6N8-7S4Y>].

contemporary to Title VII's passage,¹⁷² legal definitions,¹⁷³ and historical understandings of sex¹⁷⁴ also support the conclusion that intersex people are included under Title VII. The *Bostock* Court defined sex as "status as either male or female [as] determined by reproductive biology."¹⁷⁵ This definition, on its face, does not include intersex people and explicitly credits the sex binary, mentioning "male" and "female" as the only options for a person's sex.¹⁷⁶ However, in the next paragraph, the Court states the definition in a different way, saying that sex refers "only to biological distinctions between male and female."¹⁷⁷ This restated definition includes intersex people.

"Biological distinctions between male and female" refers to traits that are used to determine sex, also known as sex traits.¹⁷⁸ The *Bostock* Court does not state what it considers to be relevant "distinctions" between males and females. However, medical experts¹⁷⁹ and courts¹⁸⁰ define up to nine different categories of sex traits: chromosomal sex, gonadal sex (reproductive sex glands, i.e., testes or ovaries), internal morphological sex (e.g., seminal vesicles, prostate, vagina, uterus, fallopian tubes), external morphological sex (genitalia), hormonal sex, phenotypic sex (i.e., secondary sex characteristics such as facial hair or breasts), assigned sex, gender of rearing, and gender identity.¹⁸¹ Discriminating on the basis of these "distinctions between male and female" is sex discrimination under the *Bostock* Court's definition. For example, a hypothetical employer who bases hiring decisions on a secondary sex characteristic—say, the size of a woman's breasts—discriminates on the basis of sex because their decision is based on a trait that is a "distinction" between males and females.¹⁸² Likewise, a hypothetical employer who has a policy of firing anyone with a certain external morphological sex—say, anyone who has a penis—also violates Title VII. Because the decision is based on a sex trait, it is based on sex. Although examples involving chromosomal sex,

172. *Bostock*, 140 S. Ct. at 1789.

173. *See supra* section I.B.

174. Greenberg, *supra* note 33, at 278.

175. *Bostock*, 140 S. Ct. at 1739.

176. *Id.*

177. *Id.*

178. *Id.*

179. Greenberg & Herald, *supra* note 24, at 825.

180. *See, e.g., In re Heilig*, 816 A.2d 68, 73 (Md. 2003) (citing seven factors that contribute to the determination of an individual's sex); *In re Est. of Gardiner*, 22 P.3d 1086, 1094 (Kan. Ct. App. 2001) (citing eight factors).

181. Greenberg & Herald, *supra* note 24, at 825.

182. *Bostock*, 140 S. Ct. at 1738.

gonadal sex, or internal morphological sex are harder to imagine, those sex traits are also “biological distinctions between male and female” and fall under the *Bostock* Court’s definition of sex.¹⁸³ Because *all* intersex traits are sex traits, to discriminate against someone for having an intersex trait is to discriminate on the basis of sex. Under the *Bostock* Court’s definition of sex, intersex people are categorically covered under Title VII’s prohibition on sex discrimination.

The list of nine sex trait categories is expansive, and the last two elements, gender of rearing and gender identity, arguably describe gender rather than sex.¹⁸⁴ However, this does not disrupt the analysis of intersex people’s Title VII claims for two reasons. First, all intersex people have a variation in at least one of the first six indisputably “sex-like” elements.¹⁸⁵ Second, courts interpreting Title VII fail to distinguish between sex and gender.¹⁸⁶ Therefore, even variations in traits that may be more aligned with gender than sex should not defeat a person’s sex discrimination claim.

Additionally, the U.S. Department of Justice recently adopted an interpretation of “sex” based on sex traits that includes intersex people. In March 2022, the U.S. Department of Justice announced it will interpret “sex discrimination” to include discrimination against intersex people when implementing statutes such as the Violence Against Women Act and the Victims of Crime Act.¹⁸⁷ The agency cites *Bostock* for this change and indicates that “sex traits” are relevant to its reasoning: discrimination against intersex people “is based on variations in biological sex traits,” therefore being intersex is “inextricably bound up with sex.”¹⁸⁸ The agency believes “sex” should be interpreted to include intersex people.¹⁸⁹

In addition to the definition of sex used by the majority in *Bostock*, definitions supplied by the *Bostock* dissenters also support the idea that intersex people should be included under Title VII.¹⁹⁰ One dictionary definition included in *Bostock*’s appendix defines sex as “being male or female or hermaphrodite.”¹⁹¹ This definition, from the Concise Oxford Dictionary of Current English of 1964, is contemporary to the passage of

183. *Id.*

184. *See supra* section I.B.

185. *See supra* section I.A.

186. *See supra* section I.B.

187. U.S. Dep’t of Just., *supra* note 171.

188. *Id.*

189. *Id.*

190. *Bostock v. Clayton Cnty.*, __ U.S. __, 140 S. Ct. 1731, 1784–91 (2020).

191. *Id.* at 1789.

the Civil Rights Act of 1964.¹⁹² Therefore, even a court that prefers to define “sex” as it was understood by the legislators who passed Title VII (as the *Bostock* dissenters propose)¹⁹³ must acknowledge that intersex was understood to be a sex by the writers of dictionaries at that time. Two additional dictionary definitions supplied by the dissent include the word intersex under the general definition of sex, as a related term.¹⁹⁴

It is true that many dictionaries in 1964 and many contemporary dictionaries fail to include “intersex” under their definition of sex.¹⁹⁵ However, given the widespread lack of awareness about intersex people,¹⁹⁶ and the persistent tendency to think of sex in binary terms (despite evidence that sex and gender are not strict binaries),¹⁹⁷ it is reasonable to understand the failure to include intersex people as a result of ignorance, rather than intentional exclusion. Courts deciding whether intersex people are covered under Title VII will focus explicitly on intersex people in their analysis and need not overlook and exclude intersex people simply because the larger culture has. Additionally, it is not necessary for intersex to be considered a third sex for courts to recognize that intersex traits are sex traits.¹⁹⁸ Therefore, even dictionary definitions that define sex as being “male” or “female” do not detract from the conclusion that intersex discrimination is sex discrimination.

Aside from dictionary definitions, some historical sources include a third sex category or acknowledge that intersex people exist. There is evidence that early English law defined “intersex” as a sex, with one renowned 16th century jurist listing “hermaphrodite” alongside male and female as the three potential sexes of an heir.¹⁹⁹ While English society was structured around only two sexes and instructed intersex people to be placed into the binary sex category where they fit best, the law nonetheless identified intersex as an alternative to having “male” or “female” sex.²⁰⁰

Finally, in the United States, there is no definitive legal definition of sex that is consistent across states and agencies.²⁰¹ The most authoritative

192. *Id.*

193. The dissenters in *Bostock* take the view that “sex” should be determined by how the word was “understood by ordinary people at the time of enactment.” *Id.* at 1766.

194. *Id.* at 1785 (quoting *Sex*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1966)); *id.* at 1790 (quoting *Sex*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2081 (2002)).

195. *See, e.g., id.* at 1784–91 (listing definitions supplied by the *Bostock* dissenters).

196. *See supra* section I.C.

197. *See supra* Part I.

198. For a discussion of “third sex” categories, see *supra* section I.B. For further discussion on the drawbacks of classifying intersex as a third sex, see *infra* section III.B.2.

199. Greenberg, *supra* note 33, at 278.

200. *Id.*

201. Greenberg & Herald, *supra* note 24, at 836.

document that courts use to determine legal sex is the birth certificate.²⁰² Some people’s legal sex is already akin to intersex when their birth certificate does not list “male” or “female.”²⁰³ While it has been historically uncommon to leave an intersex infant’s birth certificate blank for “sex,” doctors and parents of intersex babies are increasingly declining to choose a sex on behalf of a baby who is born with ambiguous genitalia.²⁰⁴ Therefore, the fact that some people are not assigned a sex at birth, or have a birth certificate listing “unknown” or a blank space for sex, suggests that intersex is already treated as a legal sex in some contexts. Furthermore, in some U.S. jurisdictions it is now possible to list “intersex” as a person’s sex on a birth certificate.²⁰⁵ If a person has “intersex” listed on their birth certificate as their legal sex, and they are discriminated against on this basis, the discrimination is unquestionably “because of sex” under Title VII.

2. *Intersex People Are Not Excluded Under Bostock’s Reasoning*

The *Bostock* opinion can be read to include intersex people. While the Court clearly references the sex and gender binary throughout its opinion, it also includes several examples that can be read to apply to any number of sexes. Future courts finding that Title VII protects intersex people will be able to square that decision with *Bostock*, even though intersex people are not mentioned in the opinion.

Several of the rule statements in *Bostock* can be read to include intersex people. For example, the Court states that an employer’s action triggers Title VII if the employer “intentionally treat[s] individual employees differently because of their sex.”²⁰⁶ This rule does not limit the choices of sex to “male” or “female” and accommodates an interpretation of “sex discrimination” that includes “sex trait discrimination.” Likewise, the Court states that an employer violates Title VII when they “necessarily and intentionally appl[y] sex-based rules.”²⁰⁷ Hiring, firing, or treating

202. Greenberg, *supra* note 33, at 272.

203. Fiona Tapp, *What Happens When You Choose “Gender Neutral” on Your Child’s Legal Documents?*, PARENTS (Mar. 15, 2019), <https://www.parents.com/pregnancy/my-baby/gender-prediction/what-happens-when-you-choose-gender-neutral-on-your-childs-birth-certificate/> [<https://perma.cc/BBF2-D7SQ>].

204. HUM. RTS. WATCH, *supra* note 70; *see also* *Zzyym v. Pompeo*, 958 F.3d 1014, 1018 (10th Cir. 2020) (explaining that intersex plaintiff originally had a blank for sex on their birth certificate and now has “UnKnown”).

205. Mary Emily O’Hara, *Nation’s First Known Intersex Birth Certificate Issued in NYC*, NBC NEWS (Dec. 29, 2016), <https://www.nbcnews.com/feature/nbc-out/nation-s-first-known-intersex-birth-certificate-issued-nyc-n701186> [<https://perma.cc/W5LU-PMTD>].

206. *Bostock v. Clayton Cnty.*, __ U.S. __, 140 S. Ct. 1731, 1742 (2020).

207. *Id.* at 1745.

employees differently on the basis of sex traits (i.e., all intersex traits) employs a “sex-based” rule.²⁰⁸ Even though the word “intersex” may be unfamiliar to Title VII jurisprudence, the opinion makes clear that “Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.”²⁰⁹ Thus, there should be no barrier to recognizing intersex people as subject to sex discrimination.

Additionally, the Court points out that it is impossible to define homosexual or transgender “without using the words man, woman, or sex (or some synonym).”²¹⁰ This sets up another test: if an identity cannot be described without using these words, discrimination against that group involves discrimination on the basis of sex.²¹¹ Applying this test to intersex people, it is clear that one cannot define the term “intersex” without using the words man, woman, sex, or some synonym.²¹² Dictionaries defining intersex all use the terms male, female, and sex,²¹³ and it is not possible to do otherwise. Indeed, the word intersex includes the word “sex” within it. Thus, under the Court’s logic, it is impossible to consider whether someone is intersex for purposes of an employment decision without considering that person’s sex.

Additionally, the sex-binary hypotheticals posed in *Bostock* can be understood as illustrative examples that use the most common sexes—male and female—rather than exclusive examples prohibiting intersex people from accessing Title VII’s protections. To explain its holding in *Bostock*, the Court uses a series of examples and tests to illustrate that discrimination against gay people and transgender people is because of sex.²¹⁴ If these examples are taken to be exclusive, then in several parts of the opinion the only sex options available are “men and women.”²¹⁵ However, they can also be read—and are more properly understood—as non-exclusive examples using the most common sexes. For example, in a hypothetical involving an office party, the decision to fire a model employee for being gay depends on “whether the model employee is a

208. *Id.*

209. *Id.* at 1747.

210. *Id.* at 1746.

211. *Id.*

212. *Id.*

213. OXFORD ENGLISH DICTIONARY, *supra* note 5; *Intersexuality*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/intersexuality> [<https://perma.cc/XPL2-GYD9>] (redirected from “intersex”).

214. *See supra* section II.C.

215. *Bostock*, 140 S. Ct. at 1741; *see also id.* at 1742 (“If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman.”).

man or a woman.”²¹⁶ This hypothetical reads just as logically if the “sex trait” understanding of “sex” was substituted: the decision of whether to fire the employee depends on whether the model employee has sex traits of a man, a woman, neither, or both.

While it seems that the Court in *Bostock* did not intend to include intersex people in its holding, the Court’s definition of sex includes people with intersex traits. Further, the Court’s uncritical acceptance of a sex binary does not preclude intersex people’s inclusion under Title VII. Therefore, future courts determining the issue can decide that intersex people are included under Title VII without contradicting *Bostock*.

3. *The Recent Trend Is for Courts to Understand Intersex Discrimination as Sex Discrimination*

As previously discussed, some courts have declined to find that discrimination against intersex people is on account of sex.²¹⁷ However, courts deciding the issue most recently assume that intersex traits do implicate sex.²¹⁸ This reflects a shift towards greater understanding and awareness around sex and gender minorities. Given the relative youth of the intersex rights movements and continuing lack of awareness about intersex issues,²¹⁹ this pattern is not surprising. Because no court has ever ruled on whether Title VII specifically includes intersex people, a case begging this question will be a case of first impression for any judge who considers it. Future courts deciding whether intersex is a sex should continue the recent trend of recognizing discrimination against intersex people as discrimination on the basis of sex.

The most recent case involving an intersex plaintiff, *Zzyym v. Pompeo*, treats “intersex” as a sex category that corresponds to the plaintiff’s nonbinary gender identity on the plaintiff’s passport.²²⁰ The Tenth Circuit does not discuss its reasoning for including intersex as a sex. However, it states that “intersex” would be a more accurate sex designation than “male” or “female” for the plaintiff,²²¹ who is an intersex person born with ambiguous genitalia, was raised male, lived for a period as female, and who now lives as a nonbinary person.²²² Another case, *Hughes v. Home*

216. *Id.*

217. *See supra* section II.A.

218. *See, e.g., Zzyym v. Pompeo*, 958 F.3d 1014 (10th Cir. 2020) (finding “intersex” was a more accurate sex marker than “male” or “female” on the plaintiff’s passport).

219. *See supra* section I.C.

220. 958 F.3d at 1018.

221. *Id.* at 1024.

222. *Id.* at 1018–25.

Depot, Inc.,²²³ was decided in 2011 and found that an intersex person could bring a claim for gender discrimination based on workplace harassment she experienced.²²⁴ As in *Zzyym*, the court did not explain its reasoning, but assumed that the intersex plaintiff was covered under a law prohibiting gender discrimination.²²⁵

Going further back in time, courts make fewer presumptions that discrimination against intersex people is on account of sex. In *DiMarco v. Wyoming*,²²⁶ decided in 2004, the court chose not to apply heightened scrutiny to an intersex person's Equal Protection claim.²²⁷ The court did not explicitly state that discrimination against intersex people is *not* discrimination on the basis of sex; however, the plaintiff did not argue this point and the court failed to consider the issue on its own.²²⁸ *Johnson v. Fresh Mark, Inc.*,²²⁹ decided in 2003, was also equivocal about whether intersex is considered a sex.²³⁰ While the question before the court was whether a transgender person was covered under Title VII based on a sex stereotyping claim, the court seemed to suggest that the plaintiff may have had a stronger Title VII claim if she had proven she was intersex.²³¹ Finally, an anti-discrimination case decided in 1987, *Wood v. C.G. Studios, Inc.*,²³² did explicitly hold that discrimination against an intersex person was not on the basis of sex under a Pennsylvania statute.²³³

Although case law is not unanimous, judges considering the question more recently find that intersex people are included under statutes implicating “sex” or “gender.” Future courts considering the question in a Title VII context are free to follow the modern trend and decide that intersex people qualify for protections on account of sex under Title VII.

B. Other Approaches to Intersex Inclusion Under Title VII Are Underinclusive

Understanding sex discrimination to include “sex trait” discrimination is the best path to intersex inclusion under Title VII after *Bostock*. Other

223. 804 F. Supp. 2d 223 (D.N.J. 2011).

224. *Id.* at 227.

225. *Id.*

226. *DiMarco v. Wyo. Dep't of Corr. Div. of Prisons, Wyo. Women's Ctr.*, 300 F. Supp. 2d 1183 (D. Wyo. 2004).

227. *Id.* at 1197.

228. *Id.*

229. 337 F. Supp. 2d 996 (N.D. Ohio 2003).

230. *Id.* at 1000.

231. *Id.*

232. 660 F. Supp. 176 (E.D. Pa. 1987).

233. *Id.* at 177.

approaches include using the sex stereotyping theory, defining intersex as a third sex, or interpreting “sex” to mean “perceived sex.”²³⁴ While these approaches all have merit, the *Bostock* Court’s definition of sex as “biological distinctions between male and female”²³⁵ makes “sex trait” discrimination the most straightforward approach to intersex inclusion after *Bostock*.

1. *The Sex Stereotyping Theory Is Likely to Exclude Some Intersex Plaintiffs*

Under the sex stereotyping theory, plaintiffs have a valid Title VII claim when they are discriminated against for failing to conform to traditional sex stereotypes.²³⁶ Intersex people, by definition, have traits that fail to conform to sex stereotypes.²³⁷ Specifically, they have physical traits thought to be incongruent with either binary sex.²³⁸ Therefore, intersex people may have a cognizable Title VII claim if they are fired because they fail to conform to social expectations of what it means to be a “man” or a “woman” (i.e., because they are intersex).

One challenge to using the sex stereotype theory is that courts tend to interpret sex stereotyping claims as relating to behavior or appearance.²³⁹ While some intersex people may be visibly gender non-conforming, others fail to conform to sex stereotypes in ways that are undetectable to an employer who does not have access to the employee’s medical records. For example, people with Turner Syndrome have an XX genotype, except that one of their X chromosomes is missing or partially missing.²⁴⁰ This can cause them to diverge from “normal” female development by, for example, starting puberty late or not at all, ending menstruation early in life, or being infertile.²⁴¹ Most people with Turner Syndrome identify as

234. *See supra* section II.B.

235. *Bostock v. Clayton Cnty.*, __ U.S. __, 140 S. Ct. 1731, 1739 (2020).

236. “[A] plaintiff can satisfy Title VII’s because-of-sex requirement with evidence of a plaintiff’s perceived failure to conform to traditional gender stereotypes.” *EEOC v. Boh Bros. Const. Co.*, 731 F.3d 444, 454 (5th Cir. 2013).

237. *See supra* section I.A.

238. *See supra* section I.A.

239. *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (holding that “sex stereotypes concerning how a man should look and behave” provide sufficient basis for a sex discrimination claim).

240. *Turner Syndrome*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/turner-syndrome/symptoms-causes/syc-20360782#:~:text=Turner%20syndrome%2C%20a%20condition%20that,to%20develop%20and%20heart%20defects> [https://perma.cc/AH4B-EGQ7].

241. MAYO CLINIC, *supra* note 240.

women and appear to be women.²⁴² This makes it less likely that a person with Turner Syndrome would be able to bring a sex stereotyping claim against an employer who fired them for their chromosomal difference. Because past cases about sex stereotyping hinged on gendered behavior and appearance,²⁴³ an intersex plaintiff with less-detectable intersex traits is unlikely to prevail on a sex stereotyping claim.

One article proposes a variation on the sex stereotyping theory that would fill this gap, called the “anatomical nonconformity” theory.²⁴⁴ This theory posits that courts should recognize a cause of action for intersex plaintiffs “for discrimination based on anatomical nonconformity—that is, the failure for a person’s anatomical sex to conform to societal expectations for their gender.”²⁴⁵ The article points out that the Supreme Court in *Oncale v. Sundowner Offshore Services, Inc.*²⁴⁶ held that “Title VII’s protections should extend to prohibit all discrimination ‘reasonably comparable’ to the principal evil that it textually prohibits.”²⁴⁷ Because sex stereotyping is reasonably comparable to anatomical nonconformity, intersex plaintiffs should have a cause of action under Title VII.²⁴⁸ This argument, though well-reasoned, was proposed before *Bostock* was decided. After the *Bostock* Court defined sex as “biological distinctions between male and female,”²⁴⁹ the sex trait discrimination theory proposed in this Comment provides a more direct path to Title VII coverage for intersex people.

2. *Classifying Intersex People as a Third Sex Has Many Drawbacks*

Another option for intersex inclusion under Title VII is to understand intersex as a third sex category.²⁵⁰ This interpretation is well supported, as definitions in early English law and some contemporary to Title VII’s passage included “intersex” as a sex category alongside “male” and “female.”²⁵¹ However, defining intersex as a third sex category has several drawbacks. First, many intersex people do not consider their sex to be

242. Ilana Gelfman, *Because of Intersex: Intersexuality, Title VII, and the Reality of Discrimination* “Because of . . . [Perceived] Sex”, 34 N.Y.U. REV. L. & SOC. CHANGE 55, 106 (2010).

243. See, e.g., *City of Salem*, 378 F.3d at 571 (finding that plaintiff stated a valid Title VII claim under the sex-stereotyping theory based on their “gender non-conforming behavior and appearance”).

244. Berghausen, *supra* note 105, at 1307.

245. *Id.*

246. 523 U.S. 75 (1998).

247. Berghausen, *supra* note 105, at 1311.

248. *Id.*

249. *Bostock v. Clayton Cnty.*, __ U.S. __, 140 S. Ct. 1731, 1739 (2020).

250. See *supra* section I.B.

251. See *supra* section III.A.1.

“intersex,” and it is important to respect individuals’ self-perception and identity, including the language used to describe them.²⁵² Second, presenting “intersex” as a discrete sex category is inaccurate. “Intersex” itself is an umbrella term, describing people with a variety of traits.²⁵³ While all intersex people have a difference in at least one of the traits that humans use to determine sex, not all intersex people have the same difference.²⁵⁴ Therefore, describing intersex people as a cohesive “sex” group is misleading when the only thing intersex people all have in common is a failure to fit neatly into one of the two established sex categories.²⁵⁵ Third, creating a distinct third sex category works against the efforts of some gender theorists who contend that sex, gender, and sexuality exists as a continuum,²⁵⁶ or perhaps a galaxy,²⁵⁷ but demonstrably not in discrete categories.²⁵⁸ Finally, defining intersex as a third sex category would require courts to exercise a gatekeeping authority about who is sex-divergent enough to be considered intersex.²⁵⁹ This is not a role courts are well-equipped for, and works counter to the aims of Title VII, which endeavor to make an individual’s sex *not* at issue in a person’s employment.²⁶⁰

3. *The “Perceived Sex” Theory Is Difficult to Implement*

Analyzing Title VII claims based on a person’s perceived sex would include many intersex people but would be difficult for courts to implement consistently. One scholar argues that Title VII sex discrimination cases should be governed by a “perceived sex” test.²⁶¹ If an employer discriminates against an employee based on their *perception* of the employee’s sex, they violate Title VII.²⁶² Likewise, they violate Title VII if their perception of an employee’s gender *assignment* is at odds with their perception of the employee’s gender *expression*.²⁶³ This test has

252. Gelfman, *supra* note 242, at 107.

253. The Intersex Society of North America lists over twenty intersex variations. INTERSEX SOC’Y OF N. AM., *supra* note 17.

254. *See supra* section I.A.

255. *See supra* section I.A.

256. Shelby Hanssen, Comment, *Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law*, 96 OR. L. REV. 283, 285–86 (2017).

257. Gelfman, *supra* note 242, at 108.

258. *See* existence of intersex and nonbinary people.

259. Gelfman, *supra* note 242, at 109.

260. *Id.*

261. *Id.* at 111.

262. *See supra* section II.B.1.

263. Gelfman, *supra* note 242, at 111.

several benefits: it does not require a court to do a searching inquiry of the plaintiff's "actual" sex or gender, because it is based entirely on the employer's perceptions. Finding discrimination based on perceived sex also reflects how discrimination actually operates and is a principle already reflected in Title VII case law.²⁶⁴ This test also incorporates the possibility that intersex may be perceived as a third sex category by some employers (who may discriminate on that basis) without requiring a court to recognize intersex as a third sex category by law.

However, the downside to this test is that it requires courts to become quite savvy with the difference between gender assignment, gender expression, and gender identity, which is not an area in which courts have historically shown sophistication.²⁶⁵ While the perceived sex doctrine may have been a promising way to include intersex and transgender plaintiffs under Title VII pre-*Bostock*, transgender plaintiffs are now explicitly covered under Title VII using the plain meaning of the word "sex."²⁶⁶ The "sex trait" discrimination theory covers intersex people in a similarly straightforward way.

CONCLUSION

Although intersex people are often left out of discussions about sex discrimination, courts considering the issue will find that intersex people have a clear path to coverage under Title VII. This is because *Bostock's* definition of sex makes clear that discrimination on the basis of sex *traits* is discrimination on the basis of sex. Because intersex people always have a natural variation in a sex trait, intersex people are therefore always covered under Title VII. While there are alternative paths to Title VII coverage for intersex plaintiffs, recognizing that sex discrimination encompasses sex trait discrimination is the most comprehensive and straightforward path to Title VII protections.

While recognizing employment rights for intersex people is important in itself, greater acknowledgement of intersex people, including by courts, is also important for other sex and gender minorities. Many popular representations of transgender people still implicate a gender binary that reinforces an understanding of sex and gender that is simply not true for many people. The gender binary suggests that there are only two options, and that every person is either one or the other. Acknowledging the reality of not only a range of possible genders, but a wide range of sex traits—a

264. See *supra* section II.B.1.

265. Courts continue to make no distinction between "sex" and "gender," much less recognize three components used to determine gender. See *supra* section II.B.

266. *Bostock v. Clayton Cty.*, __ U.S. __, 140 S. Ct. 1731, 1737 (2020).

physical reality that people are inclined to believe is real—can encourage a broader social and legal understanding of human possibility with the potential to benefit all sex and gender minorities.